Supreme Court, U.S.
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No. 03-162

In The
Supreme Court of the United States

BULL MOOSE TUBE COMPANY, CAPARO, INC. and BULL MOOSE TUBE LIMITED,

Petitioners,

v.

CHARLES E. EMMENEGGER and ROBERT F. RITZIE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED

The District Court, applying Missouri law in a supplemental jurisdiction case, refused Petitioners' instruction defining "good faith" because, as used, it was a commonly understood term requiring no further definition. The Eighth Circuit, applying an abuse of discretion standard, affirmed, holding that "the [Petitioners'] case was not impaired, that is, there was no prejudice to the [Petitioners] from the District Court's rejection of the instructions. . . ." (citations omitted) Petitioners' Appendix, "Pet. App." 12a.

The counter question presented is:

Whether the Eighth Circuit properly employed an abuse of discretion standard to review the District Court's refusal to give a tendered jury instruction defining a commonly understood term.

PARTIES TO THE PROCEEDINGS

Petitioners are Bull Moose Tube Company, Caparo, Inc. and Bull Moose Tube Limited. Respondents are Charles E. Emmenegger and Robert F. Ritzie.

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COUNTERSTATEMENT OF THE CASE

I. STATEMENT OF FACTS.

Respondents, Emmenegger and Ritzie, were senior executives at Bull Moose Tube Company ("BMT") (Trial Transcript, Volume I, "Tr. I"/39; Tr. III/13; Tr. II/91.) In 1988, Caparo, Inc. ("Caparo"), a closely held company predominately owned by Lord Paul, acquired BMT. (Tr. I/40.) After the acquisition, Bull Moose Tube Company adopted a Phantom Stock Plan (the "Plan"). Respondents were participants in the Plan. (Trial Exhibit, "Ex." 873.)

Under the Plan, vested Participants could receive payment for their shares by making a redemption request or in the event of death, retirement, disability or termination of employment. (Ex. 1, §§ 8.1, 8.2, 8.3.) Participants such as Respondents who left BMT in 1996 due to termination without cause, death, retirement, or disability received a Redemption Price Payment of $17,751.20 per share. (Ex. 1, § 8.2.) Participants resigning or being terminated for cause received a Book Value payment of $2,791.34 per share. (Tr. I/54-57; Ex. 1; Ex. 2001-80; Ex. 2001-19D.)

"Termination of employment without cause" was defined as any termination (including discharge) by the "Corporations" [BMT or BMT Ltd.] "for other than (i) willful or gross misconduct or willful or gross negligence of . . . duties for the Corporations, (ii) intentional or habitual neglect of . . . duties for the Corporations, or (iii) theft or misappropriation of the Corporations' funds or the commission of a felony." (Ex. 1.)

The Caparo Board administered the Plan. Its decisions were binding, subject to the express provision that it

exercise its discretion reasonably and in good faith. (Ex. 1, § 2.1.) The parties chose not to define the term "good faith" in the PSP. (Ex. 1, § 2.1.) In 1994 and continuing until the morning of March 21, 1996, Plaintiffs Emmenegger and Ritzie served on and constituted at least 50% of the Caparo Board. (Tr. I/82.) Paul, the controlling shareholder of Caparo, was the only other Board member during this period. (Tr. I/81-82.)

On March 21, 1996, after Respondents made known their intention to redeem their shares, Lord Paul reconstituted the Board by removing Emmenegger and Ritzie and replacing them with his sons and his at-will employees. (Ex. 1-F; Ex. 1-G.) Acting in bad faith, the reconstituted Caparo Board terminated Respondents for cause and denied them the Redemption Price Payment for their phantom shares.

This act was motivated among other reasons by Lord Paul's desire to use the money due Respondents to finance another of his ventures. Paul instituted a pretextual investigation of Respondents that others characterized as a "witch hunt." The investigation disclosed no wrongdoing by Respondents yet it was used as grounds for discharge for cause. Lord Paul also falsely claimed that Respondents had acted dishonestly by reissuing certain shares in the Plan.

II. TRIAL COURT PROCEEDINGS.

Petitioners tendered instructions defining the term "good faith" as used elsewhere in the instructions and in the special verdict form. Verdict Form, Instructions 8, 9, Pet. App. 34a-37a. As proposed, the instruction defined "good faith" as it is understood in common usage. Petitioners did

not argue that "good faith" as used in the Phantom Stock Plan meant anything other than its commonly understood meaning in normal usage.

The phrase was relevant to the jury's deliberations because the Phantom Stock Plan in suit gave the Board authority to administer the plan "in the reasonable exercise of its discretion in good faith." Phantom Stock Plan at Section 2.3. The Phantom Stock Plan did not define or further explain "good faith."

Respondents' argued that "good faith" required no further definition because it was a term of common usage readily understood by the jury. The District Court agreed and refused the tendered instructions. During closing argument, both sides marshaled the evidence and vigorously argued whether, in discharging Respondents for cause, the Board "failed to exercise its discretion reasonably and in good faith." (Tr. VII/114-117, 126-130.) The jury returned a verdict for Respondents on two counts of the third amended complaint for breach of contract and for Petitioners on one count.

III. THE DECISION BELOW.

On appeal the Eighth Circuit reviewed the refusal to give the tendered instructions under an abuse of discretion standard long employed in the Eighth Circuit and other Circuits. Pet. App. 12a.

> We review claims of error in instructions for abuse of discretion. *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492, 496 (8th Cir. 1998). Where the trial court elects not to give proposed instructions, we will find an abuse only if the proposed instructions (1) correctly state the law,

> (2) concern a matter not otherwise covered by the charge to the jury, and (3) involve a point so important that the court's refusal to give the instructions "seriously impaired the party's ability to present an effective case." *Yannacopoulas*, 75 F.3d at 1303... Because the Company's [Petitioners] case was not impaired, that is, there was no prejudice to the company from the District Court's rejection of the instructions. See *Cox*, 163 F.3d at 497, we do not consider elements (1) and (2).

Pet. App. 11a, 12a.

As discussed below, the Eighth Circuit in dicta questioned the conjunctive wording of the refused instructions, commented on deficiencies in the Company's arguments for reversal in light of this conjunctive wording[1], and noted its disagreement with the assertion in the Company's brief that the trial record disclosed no evidence of dishonesty by the Company. *Id.*

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[1] The proposed instructions defined "good faith" as comprising three conjunctive elements. Petitioners argued below that the proposed instructions could have permitted the jury to find lack of dishonesty and intent to defraud. The court below pointed out that Petitioners did not argue that the jury could have reached a different result on the third conjunctive element – faithfulness to duty or obligation. Pet. App. 12a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

A. The Petition Incorrectly Presents The Holding Below.

Petitioners' Statement of the Case presents the holding below as follows:

> However, the Eighth Circuit concluded that the Company's "case was not impaired" by the District Court's refusal to define the term, because "there was ample evidence that the [Caparo] board did not act with 'honesty of purpose' in firing Emmenegger and Ritzie with cause. . . ." [parentheticals and citations omitted]

Petition at 9. The Question Presented is based on this characterization. *Id.* at i. Petitioners' presentation of the holding is troubling because it is at odds with the language of the opinion below. As written by the Eighth Circuit, the quote "[Petitioner's] case was not impaired" is not textually or logically related in any way to the quote "there was ample evidence that [Petitioners'] board did not act with honesty of purpose."

The language "there was ample evidence. . . ." is dictum. Petitioners took it from a sentence in the Opinion where the court below was disagreeing with the Company's [Petitioners] assertion in its appellate brief that "there was *no* such evidence [of Company's dishonesty or intention to defraud Respondents]." The court wrote "In any event, as we have discussed, we think there was ample evidence that the board did not act with 'honesty of purpose.'" Pet. App. 12a.

Petitioner has taken this dictum, paired it out of context with an excerpt of the court's holding (the "Company's 'case was not impaired. . . .'") and has presented the resulting amalgam as though it is the Eighth Circuit's holding. Petition at 9. Since the Petition and the Question Presented are founded on this troubling, incorrect presentation of the holding below, the Petition should be denied on that basis alone.

Petitioners' flawed presentation has led them to other errors. Petitioners conclude that, "[T]he Eighth Circuit implicitly assumed that the District Court's refusal was erroneous, but found that error to be harmless." (Citation omitted) Petition at 10. Here again, no objective reader could reconcile Petitioners' words with the language of the opinion. The court below in finding no abuse of discretion said that it considered only the third element of a three-part abuse of discretion test. "We do not consider elements (1) [whether the instruction is a correct statement of the law?] and (2) [does instruction concern a matter not otherwise covered by instructions?]."[2] Pet. App. 12a.

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[2] Contrary to the Petition, the refusal of the proffered instructions was not "unquestionably erroneous." Petition at 10, n.3. Two Missouri appellate courts have held that the phrase "good faith" in common usage has a well-defined and generally understood meaning. *State v. A.G.*, 670 S.W.2d 516, 516-17 (Mo. App. E.D. 1984); *State v. Russell*, 45 S.W.3d 487, 497 (Mo. App. W.D. 2001). Missouri law provides, "failure to define words of common usage which would not confuse the jury does not constitute prejudice." *State v. Rodgers*, 641 S.W.2d 83, 85 (Mo. *banc* 1982). Contrary to the Petition, the Eighth Circuit has not held "that the term 'good faith' is not a term of common usage which is readily understood by a jury." Petition at 10, n.3. Petitioners cite *Kansas City Power & Light v. Ford Motor Credit Co.*, 995 F.2d 1422, 1430-31 (8th Cir. 1993). That dispute involved whether an issuer's premature redemption of preferred stock was based on a good faith determination

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Moreover, the court below did not undertake a harmless error analysis under Federal Rule of Civil Procedure 61 or 28 U.S.C. § 2111 as the Petition states. Rather, the Eighth Circuit applied its traditional abuse of discretion test.

From this cascade of faulty thinking, the Petitioners reach the penultimate, but profoundly erroneous conclusion the harmless error analysis that they believe the Eighth Circuit conducted was both "intolerable" and in "irreconcilable conflict" with other Circuits. Petition at 11.

As the following discussion demonstrates, the abuse of discretion test applied below is virtually identical in word or concept to the test applied in other Circuits in those instances where the error on appeal is the refusal of the trial court to give a tendered instruction.

B. The Abuse Of Discretion Standard Of Review Employed By The Eighth Circuit Is Substantially Similar To The Test Employed By Other Circuits.

After reviewing the trial record, the Eighth Circuit applied one part of a three-part test to determine whether the trial court abused its discretion by refusing to define "good faith." Pet. App. 11a-12a. Citing *Cox v. Dubuque Bank & Trust Co.* 163 F.3d 492, 496-97 (8th Cir. 1998), a recent authority for this traditional test, the court below

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that issuer faced the risk of making indemnity payments to investors under the terms of a Stock Purchase Agreement. The Court instructed on a definition of "good faith." On appeal, the issue was whether the instruction was correct. Nowhere did the court hold that in its common usage, a jury could not understand the term "good faith."

found that Petitioners did not satisfy element three of the test. The refusal of the tendered instruction did not "involve a point so important that the court's refusal to give the instruction 'seriously impaired the party's ability to present an effective case.'" (Citation omitted.) Pet. App. 11a-12a.

This test (or one substantially similar) is employed in other circuits in determining whether a refusal to instruct is reversible error. *See Elliott v. S. D. Warren Co.*, 134 F.3d 1, 6 (1st Cir. 1998) (three-part test uses language virtually identical to Eighth Circuit test); *United States v. Lewis*, 53 F.3d 29, 32-33 (4th Cir. 1995) (three-part test uses language virtually identical to Eighth Circuit test); *Shaps v. Provident Life & Acc. Ins. Co.*, 244 F.3d 876, 887 (11th Cir. 2001) (three-part test uses language virtually identical to Eighth Circuit test). All but one of the cases from other Circuits cited by Petitioners as support for their flawed approach are in accord with the Eighth Circuit test. The remaining case is distinguishable. *See* Petition at 12-13.

Cases cited by Petitioners holding that reversible error occurs when the trial court refuses a requested instruction that prejudices a party's case are: *Jerlyn Yacht Sales, Inc. v. Wayne R. Roman Yacht Brokerage, Inc.*, 950 F.2d 60, 67-68 (1st Cir. 1991) (reversible error under Massachusetts law to refuse tendered instruction, which was vital to plaintiff's claim, regarding fiduciary obligations of yacht broker to principal); *Anderson v. Branen*, 17 F.3d 552, 556-57 (2nd Cir. 1994) (reversible error in a Federal Tort Claims Act case to refuse tendered instruction on duty to intervene where evidence supported such a claim); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278-281 (3rd Cir. 1998) (reversible error in employment discrimination case to refuse tendered *McDonnell Douglas*

instruction where evidence supported pretextual discharge); *Kroger Company v. Roadrunner Transportation, Inc.*, 634 F.2d 228, 230 (5th Cir. 1981) (reversible error under Georgia law for court to refuse tendered instruction on "avoidance doctrine" in auto case where evidence supported the defense); *Hisrich v. Volvo Cars of North America, Inc.*, 226 F.3d 445, 453-54 (6th Cir. 2000) (reversible error under Ohio law for court to refuse tendered instructions on claim of failure to warn of defective product where evidence supported the defense); *Heller International Corporation v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (reversible error under Illinois law to refuse to define "manifest intent" as used in fidelity bond because jury's inadequate understanding of law prejudiced plaintiff's claim); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 635-36 (9th Cir. 1996) (reversible error under Montana law since refusal of instruction on the legal effect of an adequate warning in a products case was an abuse of discretion); *Townsend v. Lumbermens Mutual Casualty Company*, 294 F.2d 1232, 1240-42 (10th Cir. 2002) (reversible error in employment discrimination case to refuse tendered *McDonnell Douglas* instruction where evidence supported pretextual discharge claim); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1547-48 (11th Cir. 1996) (reversible error in software copyright infringement case to refuse instructions on "compatibility" where evidence supported the defense); *United States v. Prigmore*, 243 F.3d 1, 17-19, 21 (1st Cir. 2001) (reversible error in criminal prosecution for conspiracy to defraud Food and Drug Administration to refuse tendered instruction defining regulatory term "affecting the safety or effectiveness of the [medical] device" as qualified by other context-providing regulations where failure to instruct seriously impaired defendants' ability to present defense.).

In each of the foregoing cases, the Circuit Court used the same legal standard, namely prejudice to the party tendering the refused instruction, as the Eighth Circuit used below. These cases resulted in a finding of prejudice and a reversal, while in this case the court below, using the same standard, found no prejudice and affirmed. Petitioners' real quarrel, it seems, is not with the standard applied but rather with the result. *See* Sup. Ct. R. 10.

Caballero v. City of Concord, 956 F.2d 204, 206 (9th Cir. 1992), a federal civil rights claim, is distinguishable as not involving a refused instruction. The District Court's instructions to the jury misstated the elements of plaintiff's claim. The erroneous instruction required the jury to find that defendant specifically intended to deprive plaintiff of his civil rights. The Ninth Circuit reversed holding that the instruction was erroneous and other than harmless.

To sum up, the abuse of discretion standard employed by the Eighth Circuit to review the refusal of the proposed definitional instructions is the proper standard and is the same standard other Circuits employ in similar circumstances. The Circuits are not in conflict on this standard. *See* Sup. Ct. Rule 10.

II. THE DECISION BELOW IS CORRECT.

The trial court has broad discretion in formulating instructions to the jury. Refusing to define a self-explanatory term is within the court's discretion. Indeed, a court often acts within its discretion in refusing to elaborate the meaning of terms, even legal terms that fall short of being self-explanatory. *U.S. v. Prigmore*, 243 F.3d 1, 17 (1st Cir. 2001).

The Phantom Stock Plan used the term "good faith." The Plan did not define the term. At the instruction conference and in their motion for new trial, Petitioners did not argue that the phrase had any special meaning as used in the Plan which required explanation in order for the jury to understand its meaning. The instructions Petitioners tendered simply parroted the definition of the term in its common usage. Indeed, their proposed definition closely paraphrased the language used by two Missouri courts when stating the well-defined and generally understood meaning of "good faith." *State v. A.G.*, 670 S.W. 2d at 517; *State v. Russell*, 45 S.W.3d at 497.

The trial court instructed the jury on Respondents' burden of proving that Petitioners failed to act in good faith. *See* Instructions 8, 9; Tr. VII/134-135 and Verdict Form, Pet. App. 34a-37a. Petitioners were not impaired in any respect either in presenting evidence or arguing that they had acted in good faith. Regarding the verdicts in question, the jury simply believed Respondents' case and disbelieved Petitioners' case.[3]

On appeal and in this Court, Petitioners have not pointed to any matter in the record that demonstrates that the trial court's failure to define a self-explanatory term seriously impaired their ability to present their defense. Without such a showing, the Eighth Circuit was correct in

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[3] Petitioners suggest that the split verdicts are inconsistent and indicate confusion on the part of the jury. Petition at 14, n.5. The Eighth Circuit found that the verdicts are "easily reconcilable and therefore not inconsistent with each other." Pet. App. 10a.

holding that the District Court exercised its discretion properly.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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